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# ORIGINS OF DIPLOMATIC IMMUNITY IN ENGLAND

MARGARET BUCKLEY

## I. INTRODUCTION

In early times, before there existed any conception of diplomatic status or diplomatic immunity as such, the need existed for one sovereign to communicate with another, to make treaties and generally to transact such business as might be necessary. These communications were made by way of "diplomatic missions" which meant that the sovereign chose a favoured person or persons to go to a foreign State with a specific purpose. Often, the sovereign would use priests and monks to undertake his mission and if he did, their status of *vir religiosus* was sufficient to ensure their safety.<sup>1</sup> In all other cases, the practice was for the sovereign to issue a safe-conduct to the foreign sovereign or his envoy, such as the letters patent of October 30, 1200,<sup>2</sup> which granted the King of Scotland and his suite "a safe conduct to come to us, to stay at our court and to return safely and securely to your own country."<sup>3</sup> But this was a complicated process; application to the foreign sovereign was necessary in each individual case and an unprotected messenger was required to go abroad with a letter of request to the foreign sovereign and to return home with the letters patent.<sup>4</sup>

The grant of safe-conduct was sometimes unnecessary, for example under a treaty which made special provision for the exchange of envoys. The Treaty of September 30, 1471, between King Edward IV of England and Duke François of Brittany provided that for the duration of the truce between England and France, ambassadors and messengers from one court to the other should not need any safe-conduct except the letters they carried from their sovereign.<sup>5</sup>

These are the origins of the concept of diplomacy, at least in England,<sup>6</sup> but England was not the home of the rapidly developing ideas on diplomatic exchanges. It was in Renaissance Italy that the origins of diplomacy as we understand it today are to be found. But, even in Italy, an ambassador was someone sent to procure something or to carry a

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1. See letters of January 4, 1220, *De forma Treugae Regi Franciae Mittenda* and of March 22, 1226, *De Tractato Pacis cum Rege Franciae Resumendo*, in 1 RYMER 236 and 285.

2. 1 RYMER 121.

3. The continental practice was similar. See the safe-conduct granted by Henry III to the King of Navarre's son on August 25, 1242 1 *Lettres de Rois* 72.

4. See the letter of July 20, 1212, from King John to the Court of Flanders, 1 RYMER 161-2.

5. 3 DUMONT, Part I, at 438.

6. See SCHWARZENBERGER, *FRONTIERS OF INTERNATIONAL LAW*.

message and to return after the mission was completed; there was no concept, until the mid-fifteenth century at least, of a permanent mission. Much light is thrown on this subject by Bernard du Rosier's *Short Treatise about Ambassadors*, published in 1437.<sup>7</sup> Its author was a man of wide diplomatic experience, accustomed to serving on missions, and he wrote the book for practical use by diplomats. Du Rosier was of the opinion that ambassadors possessed an immunity in person and property from the law while engaged in the mission, and he said that these privileges stemmed from the civil and canon law. He allowed the immunities to extend to the regular members of the Ambassador's suite. There cannot be any dispute that Du Rosier's premise or basis of the immunity was not the established law, but rather some kind of international convention and custom.

Du Rosier had no concept of permanent embassies, although such missions had existed in at least two countries until about one hundred years before his time. It is interesting to note that as early as the reign of Edward I in England, English procurators were established at the French court on a permanent or semi-permanent basis and vice versa. This practice died out in the mid-fourteenth century and was not revived for the next two hundred years.<sup>8</sup>

Diplomatic activity in England did not become pronounced until the end of the fifteenth century:<sup>9</sup> it seems certain that Henry VII and Henry VIII had a Venetian envoy at least. Certainly, the main type of ambassador in the Middle Ages was the papal nuncio, whose office was sacred.<sup>10</sup>

Gradually, the practice of a resident Ambassador and suite grew up, and by the early sixteenth century there were several resident ambassadors in England. As their numbers increased, a new problem arose: what was their position with regard to the law of the country in which they were stationed? The theorists from the earliest times had talked in vague and unsettled terms of the ambassador's alleged personal immunity. The idea was one of "personal law," that the ambassador carried his own law with him and he should be tried by that law as opposed to the law of the country in which he resided. At the time this idea was developed there was no practical application except in relation to the short visits made by an envoy to a foreign state. This early idea developed, theoretically, over the centuries and it is probable that by the sixteenth century the theory, or fiction, of extraterritoriality had come to stay. The exact date of practical origin of the fiction has always been a

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7. Du Rosier was Provost of Toulouse when he wrote it and he later became Archbishop of Toulouse.

8. See MATTINGLY, *RENAISSANCE DIPLOMACY* 66.

9. There is some doubt as to the exact date.

10. There was a certain Roman influence here: See V. E. HRABAR, *De Legatis et Legationibus Tractatus varii; De Legatorum Jure Tractatum Catalogus Completus*.

matter for dispute between historians and lawyers, and it seems unlikely that it will ever be resolved to everyone's satisfaction.<sup>11</sup>

Adair, choosing the sixteenth century as his starting point for the growth of the fiction, based his theory on the fact that resident embassies became more numerous; thus the national law increased in importance, and the attempt was made to assert it over everyone resident in the country. Naturally, this produced a conflict between the national law and the alleged status of the ambassador, which finally resolved itself with the gradual introduction of the fiction of extraterritoriality. Another possible reason for the growth of the fiction at this stage was that the religious difficulties in Europe at the time produced, in turn, diplomatic difficulties, as when a Roman Catholic envoy came to England after Henry VIII's reign; so it is probable that envoys were recognized as being in a special position.

As one might expect in looking back at the ideas and practice of the sixteenth century, the theory was often different from the practice; at some stages, the theory seemed to be in advance of the practice, and at other times, the converse was true. Once the fiction of extraterritoriality had evolved, its application both in theory and practice can be distinguished according to whether the law applicable was civil or criminal.

## II. IMMUNITY IN CRIMINAL LAW<sup>12</sup>

At the beginning of the sixteenth century, the theorists were doubtful as to whether diplomatic immunity existed from criminal suits and, if so, how far it extended. In practice the immunity was becoming recognized. Coke tells us of *Pole's case*<sup>13</sup> in which Pole, being a rebel and traitor, fled from England to Rome, whence he was sent by the Pope to France as Ambassador. Henry VIII, on good terms with France but not with Rome, took the opportunity to demand Pole's return for trial. He was unsuccessful. Coke used this case as an example to support his theory of immunity but it would seem to belong more properly to the early law of extradition.

As a general theory, foreign writers upheld the personal inviolability of ambassadors. Dolet allowed its existence<sup>14</sup> whereas Brunus modified the absolute view and said that ambassadors were protected if they behaved properly and did not stray beyond their functions.<sup>15</sup> But there

11. Oppenheim's International Law would date the fiction from the seventeenth century; SCHWARZENBERGER, *op. cit. supra* note 6, also favours a later date. Grotius used the expression "fictione simile constituerentur quasi extra territorium" in II *De Jure Belli ac Pacis*, ch. 18, ¶ 4 (1646 Ed.) for the first time. Adair would take the 16th century. ADAIR, EXTRANETRIALITY OF AMBASSADORS IN THE 16TH AND 17TH CENTURIES.

12. See ADAIR, *op. cit. supra* note 11, at 15-68.

13. TEMP. 1509-1547. See 4TH INSTITUTE.

14. See DE IMMUNITATE LEGATORUM (1541).

15. DE LEGATIONIBUS (1548).

existed instances at about the same period of time which show that the immunity of the ambassador was not always recognized in England during this period. In 1511, Girolamo Bonvisi, the special nuncio at the English Court, persuaded the Spanish Ambassador to tell him that England and Spain had formed an alliance against France. He then imparted the information to the French. Wolsey kept him in the Tower for some time, a flagrant violation of his immunity. This action could be justified on the ground that Bonvisi had betrayed the Pope, who had favoured war with France.<sup>16</sup> A similar reason was probably behind Wolsey's arrest of Louis de Praet, the Emperor's Ambassador in 1524. De Praet had written to his sovereign, advising him to complete a peace treaty with France with whom the allies were at war. Wolsey discovered these activities, and he had de Praet arrested to await punishment.<sup>17</sup> But these were matters of politics. As one authority has pointed out:

Ambassadors were not, as a class, much given to homicide, robbery with violence or the more spectacular forms of rape . . . the crimes [they] were likely to be charged with were political.<sup>18</sup>

In 1556, the French Ambassador in England was found to be involved in Sir Henry Dudley's plot against Queen Mary. The Privy Council did not know whether he could be dealt with as a conspirator without violating the *jus gentium*. The decision was essentially political in that the Ambassador was not punished because a war with France was considered a possible consequence. He was recalled.<sup>19</sup> In 1569 the Spanish Ambassador was imprisoned in his house on the principle that he had acted beyond the instructions of his sovereign, thereby being reduced to the position of a private citizen.<sup>20</sup>

At about the same time, a new theory was gaining ground which appears to have been based on the prevailing political situation. It is possible that the practice led to the adoption of the theory after the Bishop of Rosse's case.<sup>21</sup> The Bishop was the Scottish Ambassador at the English Court and it was discovered that he was involved in various plots against the Crown. Because of the difficulties attaching to his diplomatic position, five of the most distinguished civil lawyers of the day<sup>22</sup> were consulted. They said:

We are of opinion that an Ambassador procuring an insurrection or rebellion in the Prince's country towards whom he is

16. CAL. OF S.P., I SPANISH 552.

17. *Ibid.* III Spanish at 50-56, 62-65.

18. MATTINGLY, *op. cit. supra* note 8, at 274.

19. ANTOINE DE NOAILLES, CALENDAR OF STATE PAPERS, VENICE, 460, no. 495.

20. See BYNKERSHOEK, DE JURE COMPETENT 209; CAL. OF S.P., SPANISH, I 97-172.

21. See MURDIN'S *State Papers*, p. 18, dated October 17, 1571 in THE HISTORY OF THE MOST RENOWNED AND VICTORIOUS PRINCESS ELIZABETH (Camden ed. 1688).

22. Daniel Lewis, Valentine Dale, William Drury, William Aubrey and Henry Jones.

Ambassador, ought not, *jure gentium et civili romanorum*, to enjoy the privileges otherwise due to an Ambassador; but that he may, notwithstanding, be punished for the same.

This practical decision may well have led Gentili, writing after consultation about Mendoza's position in the Throgmorton plot of 1583-1584,<sup>23</sup> to say that conspiracy by an Ambassador against the sovereign of the country in which he resided would render him liable to expulsion, whereas an actual overt act as a result of conspiracy would render him liable to punishment there.<sup>24</sup>

Hotman, also consulted about Mendoza's position, was of much the same opinion as Brunus and said that imprisonment was possible for conspirators against the sovereign and also for a crime committed against a private person.<sup>25</sup> At the beginning of the seventeenth century the attitudes and theories in England began to change. It may have been that with the last of the Tudors the age of the "plots" and intrigues disappeared. No historian would pretend that the Court of James I or Charles I was the hotbed of political intrigue that made the Tudor Court so notable, especially in the latter half of the sixteenth century. So Kirchner, writing in 1604,<sup>26</sup> drew a new distinction between crimes committed against the law of God and against the law of nature on the one hand, and crimes invented by man, on the other. He asserted that the Ambassador was punishable only when he committed a crime of the former type.<sup>27</sup>

Kirchner's ideas were adopted to a certain extent by Coke, who refers to *Marche's case*<sup>28</sup> in which proceedings for piracy were sought to be brought against one who claimed to be the ambassador of the King of Morocco. Although the reasons are not very clear, the proceedings were disallowed. Coke's ideas on immunity were to some extent the product of his age, although certain aspects do not appear to have a sound basis.<sup>29</sup> As far as immunity from criminal suits is concerned, he is firm and straightforward:

Ambassadors ought to be kept from all injuries and wrongs, and by the law of all countries and of all nations, they ought to be safe and sure in every place, in so much that it is not lawful to hurt the ambassadors of our enemies and herewith agreeth the civil law.

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23. DE LEGATIONIBUS, LIBRI TRES (1585).

24. Cf. I HALE, HISTORY OF THE PLEAS OF THE CROWN, 96-98, where the opinion expressed is that an overt attempt at rebellion or treason is punishable with death "by the law of nations."

25. See DE LA CHARGE ET DIGNITÉ DE L'AMBASSADEUR (1604).

26. See LEGATUS.

27. Cf. GROTIUS' IDEAS.

28. 3 Bulstr. 27 (1615); see 4TH INSTITUTE 153.

29. See CIVIL IMMUNITY.

Indeed, he takes his theory to what might be felt to be inordinate lengths, for he goes on:

And if a banished man be sent as ambassador to the place from whence he is banished, he may not be detained or offended there.<sup>30</sup>

But there were more learned juristic opinions to be sought. In 1624, Inojosa, the Spanish Ambassador, accused Buckingham of conspiring to dethrone James I. Dr. Welwood and Sir Robert Cotton were consulted as to Inojosa's punishment. Dr. Welwood denied the existence of any special privileges for ambassadors,<sup>31</sup> but Cotton thought that ambassadors were exempt from trial in the ordinary courts. One authority, at least, is of the opinion that political expediency may well have led to Cotton's view.<sup>32</sup>

By this time the "law of nations" theory had reached its peak. Following Kirchner to a certain extent, Coke and Grotius expounded their views. To Coke, there were specific offences for which the ambassador could be punished:

A crime *contra jus gentium*, for example, treason, felony, adultery or any other crime which is against the law of nations.

But for crimes *malum prohibitum* which were not *malum in se jure gentium* nor *contra jus gentium*, the ambassador, in Coke's view, could not be liable.<sup>33</sup>

Grotius, considered by many historians to be the first authority on the extraterritoriality of ambassadors, certainly had the clearest juristic ideas of his generation. Converting Kirchner's law of *nature* into law of *nations*, Grotius maintained that ambassadors had complete immunity on the reasoning that the ordinary law of the country, applying to all in it, is changed by the common consent of nations to exclude ambassadors who are, by fiction, *extra territorium*.<sup>34</sup>

In 1654, a case occurred, the outcome of which supported the theories of Gentili. M. de Baas, the French Ambassador to London, was ordered to leave within twenty-four hours, for conspiring to kill Cromwell.<sup>35</sup> From this case, it would appear that despite the theories of immunity prevalent at the time, practical politics infringed on theory when the need arose. Zouch<sup>36</sup> followed to a large extent the ideas of Grotius and

30. See 4TH INSTITUTE, 153.

31. His paper is among the Caesar papers in the British Museum (Add. MS. 124ab.fo.411), May 7, 1624.

32. See ADAIR, *op. cit. supra* note 11 at 24, 25.

33. See Case of Don Pantaleon San, 5 Howell's St. Tr. 462 (1654).

34. II DE JURE BELLI AC PACIS, ch. 18, ¶ 4.

35. 2 THURLOE, STATE PAPERS.

36. SOLUTIO QUAESTIONIS VETERIS ET NOVAE (1657).

Wicquefort,<sup>37</sup> writing a book of diplomatic practice, conceded full immunity to the ambassador on the grounds that he represented the actual person of the sovereign. Hale, in 1736, preferred Gentili's view, and said that by the law of nations, an ambassador could be put to death if he made an overt attempt at rebellion. Bynkershoek,<sup>38</sup> followed the theories of Grotius.

Despite the variance between the learned theorists, it would appear that theory alone did not play the dominant part in the largely political problem of diplomatic immunity. The theories ranged from complete immunity to complete absence of immunity, and while the jurists were evolving their intricate rules, the records fail to reveal even one ambassador who was prosecuted<sup>39</sup> or indeed, any ambassador who was seriously affected by loss of goods. The sensible view may well be that the fiction of extraterritoriality was the product of the practice, the justification for the treatment of ambassadors, rather than an idea in the vanguard which led to the granting of diplomatic immunity in practice. As Hurst pointed out, the practice of immunity was far more important than the theorists' arguments for or against it. Hurst went so far as to maintain that there was no precedent for a foreign diplomatic agent to be subjected to the criminal jurisdiction of the country in which he served.<sup>40</sup>

### III. IMMUNITY FROM CIVIL JURISDICTION

The early writers on this aspect of diplomatic immunity based their ideas not on the fiction of extraterritoriality, but on the doctrines of Roman law. Ulpian was the originator of the Roman idea that the ambassador was not liable for contracts made before he assumed office, but only for those made during his term of office. The reason for this distinction was, as Gentili said, that if ambassadors were not liable for contracts made by them, no-one would contract with them.<sup>41</sup> Octavian Maggi thought that ambassadors were immune even for contracts made during their embassy,<sup>42</sup> but in 1507, De Puebla, Spanish Ambassador to London, expected to be imprisoned because he was unable to pay his debts.<sup>43</sup> Conversely, in 1556, the Council refused to allow the landlord of the French Ambassador, de Noailles, to sue for the rent owed to him. Ayrault was another voice in favour of complete immunity.<sup>44</sup>

37. L'AMBASSADEUR ET SES FONCTIONS (1687).

38. DE FORO LEGATORUM.

39. The Case of *Don Pantaleon San* is quoted by some authorities as disproving this point, but in that case, it was established that Don Pantaleon was not protected simply by virtue of his position as brother of the Portuguese ambassador; see 5 Howell's St. Tr. 462 (1654).

40. See INTERNATIONAL LAW 217 (1950); see also R. v. Guerchy, 1 Blackstone 545 (1765), in which the French ambassador was indicted, and the subsequent *nolle prosequi*.

41. Bk. II, *op. cit. supra* note 34, at ch. 16, ¶ 74.

42. DE LEGATO, LIBRI DUO, fos. 6-86 (1566).

43. CAL. of S.P. I. SPANISH, no. 552, Oct. 5, 1507.

44. L'ORDRE, FORMALITÉ ET INSTRUCTION JUDICIAIRE, pt. IV, ¶¶ 13 and 15.



The unstable position of the law, at least in the eyes of its onlookers, was further emphasized in the two cases concerning Antonio Foscari, the Venetian Ambassador. In 1612, one of his creditors was arrested for demanding money owed, and seizing his coach,<sup>45</sup> but by 1615 when Foscari still refused to pay his debts, the Privy Council ordered him to pay, and authorised the creditor to seize his goods if he defaulted.<sup>46</sup>

Coke had yet another idea. He said that contracts which were "good *jure gentium*" were enforceable against the ambassador. In this respect, more than a little of his authority was undermined by Blackstone who observed that no ambassador was answerable in England for a civil suit, and noticing Coke's observations he added that so few cases had arisen where the privilege was either claimed or disputed, that the law books were silent on this question before Queen Anne's reign.<sup>47</sup>

Grotius<sup>48</sup> developed the theory that ambassadors were immune with regard to suits concerning moveables, but with regard to immovables he thought that they were subject to the jurisdiction under the doctrine of *lex loci rei sitae*. Bynkershoek modified this theory by suggesting that those movables and immovables not essential to the ambassador in the performance of his functions were subject to the local jurisdiction.<sup>49</sup>

In fact the situation was rather different from the ideas of the theorists, as was shown by the famous case of the Russian Ambassador to London, *Mattueof's* case.<sup>50</sup> Mattueof was recalled in 1708 but he had various creditors who, on learning of his imminent departure, decided to take action. They removed him with force from his carriage, seized his sword, hat and stick, and took him to a public house where he was placed in the custody of an officer of justice. Bail was quickly arranged and the enraged ambassador protested to the Queen, wrote to the Secretary of State and departed forthwith for Russia. The Czar demanded that the offenders should be punished and they were duly tried in the Court of Queen's Bench for, *inter alia*, assaulting and arresting the ambassador. In fact, the Queen was in a very awkward position. It was no crime to arrest private persons for debt in 1708, nor was it a crime by statute to arrest an ambassador for debt. However, the Czar demanded appeasement and after examination by the Privy Council, seventeen people were committed to prison. Holt, C.J., presided over the court in which they were tried. The real question at issue was, could an ambassador be arrested for debt? Sir James Montague, A.-G., justified the negative argument on the ground of public policy. He said that sovereigns would be cautious of sending ambassadors to England if their privileges could be

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45. *State Papers, Domestic*, James I, 70, no. 79, Sept. 29, 1612.

46. *ACTS OF P.C.* 1615-16, p. 291 (1615).

47. *1 BL. COMM.* 252 (17th Ed.).

48. *Op. cit.*, *supra* Book II, ch. 18, ¶ 9.

49. *TRAITÉ DU JUGE COMPÉTENT DES AMBASSADEURS*.

50. 10 *Mod. Rep.* 4 (1709).

"invaded for the preservation of the property of a private subject." He went on to observe that "the person of an ambassador has ever been held sacred and inviolable by the law of nations" and that his goods were not liable to arrest. He referred to the fiction that the ambassador represents the person of his sovereign and becomes "extraparochial." Despite the strong argument for the defendants that if the Attorney-General's argument were accepted, they would be without remedy for the recovery of their debt, they were all convicted on *the facts* by the jury. The question of law, as to how far those facts disclosed a criminal offence, was reserved, to be later argued before the judges. Such argument did not take place, possibly because it was apparent that the facts as found by the jury did no more than create the offence of "manhandling the ambassador" which was not a crime in itself. Lord Mansfield attempted to justify the fact that the case was taken no further, by declaring that the law of nations was always part of the law of England and the infraction of the law of nations could only be a misdemeanor punishable by fine, imprisonment or pillory, all of which were so small a sentence as to be a fresh insult to the Czar.<sup>51</sup> In fact, of course, there was no penalty that could legally be imposed on the convicted defendants. Diplomatically, the Queen chose to appease the Czar in another way, she caused an Act to be passed which declared all proceedings against ambassadors void. The Diplomatic Privileges Act of 1708<sup>52</sup> states in the preamble the reasons for its existence, *viz.* the behaviour of "several turbulent and disorderly persons . . . contrary to the law of nations and in prejudice of the rights and privileges which ambassadors and other publick ministers authorised and received as such have at all times been thereby possessed of and ought to be kept sacred and inviolable."

Section 3, the main part of the Act, laid down that all writs and processes against any ambassador or his domestic servants shall be null and void if they could result in their arrest or imprisonment or the seizure of their chattels.

Section 4 added that anyone issuing such writ or process was liable to penalties to be decreed by the Lord Chancellor, the Lord Chief Justice and the Chief Justice of the Common Pleas, or any two of them.

The passing of this Act led to another problem; or more correctly one should say that the Act set up a trend which led to a problem. It was with regard to the interpretation of 7 Anne, c. 12, that the question first arose. Was it declaratory of the common law or was it new law? There are, and have been since the eighteenth century, two lines of thought on this matter. On the one hand, virtually all the international theorists and judges' *obiter dicta* on the subject have supported the notion that the Act was merely declaratory of the common law position. On the

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51. See *Triquet v. Bath*, 3 Burr. 1478, 1480 (1764).

52. 7 Anne ch. 12.

other hand, various learned writers on English law who have considered the matter in no little detail, and certain decided cases on the point itself, have preferred the view that the Act was not declaratory of the common law because the principles of international comity, or international law, or simply *jus gentium* comprised in the Act were not part of English law prior to 1709 and consequently could not have been incorporated into the common law.

The first view, that the Act was simply a declaration of the common law, was first enunciated by Lord Mansfield in 1764:<sup>53</sup>

[A]ll that is new in this Act is the clause which gives a summary jurisdiction for the punishment of the infractors of this law.

He also quoted Lord Talbot as saying, in an earlier case,<sup>54</sup> that "the law of nations in its full extent was part of the law of England." A year later, in *Lockwood v. Coysgarne*,<sup>55</sup> the same judge observed that "the Statute of 7 Anne was only declaratory of the law of nations which . . . was in full force in these kingdoms." In 1767 Lord Mansfield again endorsed this view in *Heathfield v. Chilton*<sup>56</sup> when he observed that "the privileges of public ministers and their retinue depend upon the law of nations, which is part of the common law of England. And the Act of Parliament of 7 Anne, c. 12, did not intend to alter, nor can alter the law of nations." It would be difficult to find a clearer statement of any judge's interpretation of the premises of an Act, than this. And Lord Mansfield was not the only learned judge who found this to be the state of the common law prior to 1709. In *Parkinson v. Potter*,<sup>57</sup> Mathew, J., endorsed the view that the doctrine of Section 3 of the 1708 Act had been said many times to be only declaratory of the common law and based on the comity of nations and added that "it appears from the authorities that the privilege of the embassy is recognised by the common law of England as forming a part of international law."<sup>58</sup> Willes, J., adding his judgment in the case, quoted various sources of this principle with approval.<sup>59</sup> Not only

53. See *Triquet v. Bath*, *supra* note 51.

54. *Barbuit's Case* Cas. temp. Talbot 281 (1736).

55. 3 Burr. 1676 (1765).

56. 4 Burr. 2015 (1767).

57. [1885] 16 Q.B.D. 152.

58. *Id.* at 157.

59. *E.g.*, 4 VATTEL, LAW OF NATIONS, ch. 8, ¶ 110:

It is not on account of the sacredness of their person that ambassadors cannot be sued; it is because they are independent of the jurisdiction of the country to which they are sent.

1 WHEATON, INTERNATIONAL LAW 453:

From the moment a public minister enters the territory of the state to which he is sent . . . he is entitled to an entire exemption from the local jurisdiction, both civil and criminal. Representing the rights, interest and dignity of the sovereign or state by whom he is delegated, his person is sacred and inviolable . . . The act of sending the minister on the one hand, and of receiving him on the other, amounts to a tacit compact between the two states that he shall be subject only to the authority of his own nation.

does Willes, J., quote with approval what these jurists said, but he annexed their views to Mathew, J.'s statements, so that the international law he referred to was shown to be summarized by those writers.

Lord Warrington in *Engelke v. Musmann*<sup>60</sup> observed:

[I]t is well settled that the questions we have been discussing do not depend on the Statute [7 Anne, c. 12] but are principles of the common law having their origin in the idea of the comity of nations.

More judicial support for this view can be found in the case of *The Amazone*<sup>61</sup> in which Slessor, L.J., said:

[T]his statute of Queen Anne is by no means exhaustive of the common law dealing with diplomatic immunity.<sup>62</sup>

Goddard, L.J., made his view even clearer, when he said:

[I]t is well established that it is the common law of this country that . . . ambassadors . . . are exempt from judicial process. The statute of Anne is declaratory . . . and it really does not achieve any change in the law. It is not a change in the law, but an addition to the law.<sup>63</sup>

The weight of judicial opinion became even heavier when Lord Caldecote in *R. v. A.B.*<sup>64</sup> said that it was agreed that this privilege derived from the comity of nations. Therefore, it is evident that the combination of judicial authority<sup>65</sup> and juristic thought have produced a formidable body (or so it appears) of interpretative authority which seems, *prima facie*, to establish beyond any doubt that the principles of international law on which the doctrine of immunity rests were firmly embedded in the common law before 1709. Professor Berriedale Keith was of opinion that the Act (7 Anne, c. 12) was passed, not because punishment could not be inflicted on the offenders at common law, but because no such punishment would have been sufficient to appease the Czar.<sup>66</sup>

It is suggested that it is not possible to decide whether or not the Act of Anne was simply declaratory of the common law unless one looks at the relations between international law and English municipal law in a more general context. Blackstone, a contemporary of Lord Mansfield, and possibly influenced by his judgments, observed in 1765 that

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See also GROTIUS, *op. cit. supra* note 27; BYNKERSHOEK, *op. cit. supra* note 20; MARTENS, *CAUSES CÉLÈBRES DU DROIT DES GENS* (1858).

60. [1928] A.C. 433, 458.

61. [1940] P. 40.

62. *Id.* at 44.

63. *Id.* at 47.

64. [1941] 1 K.B. 454.

65. These expressions of judicial approval have been endorsed in many other cases; most recently in *Empson v. Smith* [1965] 3 W.L.R. 380 by Danckwerts, L.J.

66. See 12 *Journal of Comparative Legislation and International Law* 126.

the law of nations . . . is here adopted in its full extent by the common law, and is held to be a part of the law of the land. And those Acts of Parliament, which have from time to time been made to enforce this universal law, or to facilitate the execution of its decisions, are not to be considered as introductive of any new rule, but merely as declaratory of the old fundamental constitutions of the kingdom.<sup>67</sup>

There is no doubt that judges have applied principles of international law in several English cases. In *Viveash v. Becker*,<sup>68</sup> a case on consular immunities, Lord Ellenborough agreed to look at the opinions of international writers on the subject. He observed that "if we saw clearly that the law of nations was in favour of the privilege, it would be afforded to the defendant; and it would be our duty rather to extend than to narrow it." The same judge, in *Wolff v. Oxholm*,<sup>69</sup> said that where international law applied and there was no common law rule, international law should be applied by our courts. Lord Eldon had expressed the same opinion in *Dolder v. Huntingfield* some years earlier.<sup>70</sup> In *Novello v. Toogood*<sup>71</sup> Abbott, C. J., said that the Act of 1708 "must be construed according to the common law, of which the law of nations must be deemed a part." Best, C.J., was even more definite in *De Wutz v. Hendricks*<sup>72</sup> when he observed that the law of nations "is adopted into the municipal code of every civilised country." In *The Duke of Brunswick v. The King of Hanover*,<sup>73</sup> a case relating to the immunity of a foreign sovereign from suit, the court observed that "there is no English law applicable to the present subject, unless it can be derived from the law of nations, which, when ascertained, is to be deemed part of the common law of England." The same principle was noticed by Lord Alverstone, C.J., in *West Rand Cent. Gold Mining Co. v. R.*:<sup>74</sup>

[W]hatever has received the common assent of civilised nations must have received the assent of our country, and that to which we have assented along with other nations in general may properly be called international law, and as such will be acknowledged and applied by our municipal tribunals when legitimate occasions arise for those tribunals to decide questions to which doctrines of international law may be relevant.

Professor Lauterpacht cited several of the above cases in a very persuasive article on this subject which was designed to show that "the law of nations is per se part of the law of the land."<sup>75</sup> He also used two

67. 4 BL. COMM. 67; see 10 HOLDSWORTH, HISTORY OF ENGLISH LAW 373.

68. 3 M & S 284 (1814).

69. 1 M & S 92, at 100-6 (1817); see also 14 HOLDSWORTH, *op. cit. supra* note 67 at 24.

70. 11 Ves. 283, 285 (1805).

71. 1 B. C. 554, 562 (1823).

72. 2 Bing. 314, 317 (1824).

73. 6 Beav. 1 (1844).

74. [1905] 2 K.B. 391, at 406.

75. 30 TRANSACTIONS OF THE GROTIUS SOCIETY 51.

other rules in an attempt to prove his point. First, he observed, the rule of construction that Acts must be interpreted so as not to conflict with international law showed the courts' intention to act in accordance with his "monist" theory. But his argument was not satisfactory, for by admitting that "the absolute superiority of Acts of Parliament even when they conflict with international law, has indeed been repeatedly and emphatically affirmed" he was in difficulty from the outset.<sup>76</sup> It was indeed the rule that in interpreting Statutes, they should be presumed not to conflict with principles of international law, but this presumption would only be applied in cases of ambiguity and it was, at most, a *presumption*. Lauterpacht interpreted the rule in these terms:

[T]he rule of construction is that, while Acts of Parliament are in every case of overriding effect, they must, if only possible, be interpreted so as not to be in conflict with international law; they must be interpreted against the background of international law in the same way as they must be construed by reference to the principles of international law.<sup>77</sup>

With great respect to the distinguished writer, he appears to have misconstrued the rule. He made no mention of the fact that the presumption could only be resorted to in cases of ambiguity.<sup>78</sup> The true rule was that Parliament would be presumed to have had no intention of violating international law and the presumption was not applied to any Statute unless the Statute was ambiguous and appeared to have done so. An example of the operation of the presumption was shown in the case of *The Le Louis*<sup>79</sup> in which an Act of Parliament which authorised the Commanders of English ships of war to seize and prosecute "all ships and vessels" engaged in the slave trade was construed as not intended to affect any right or interest of foreigners contrary to the law of nations.<sup>80</sup> But in that case there was ambiguity of expression. Within the bounds mentioned, the presumption certainly related international law to English law, but to suggest that it made the former part of the latter would not be correct.

Lauterpacht's second argument was that international law need not be proved in the same way as foreign law, since it was not regarded as foreign law. He observed that judicial notice was taken of it, in the same way as such notice was taken of Acts of Parliament.<sup>81</sup> He admitted that although his statement illustrated English judicial practice, he could not trace any judicial pronouncement bearing directly on the matter;<sup>82</sup>

76. *Id.* at 58.

77. *Id.* at 57.

78. *Niboyet v. Niboyet*, 4 P.D., 1 (1878).

79. 2 Dods. 210 (1817).

80. See MAXWELL, *INTERPRETATION OF STATUTES* 142-5 (11th Ed.).

81. Lauterpacht, *op. cit. supra* note 75, at 59.

82. *Ibid.*

and although he criticised Picciotto's contention that international law must be proved as a question of fact like any other foreign law, he could not refute it. It is suggested that Lauterpacht was incorrect on this point. The authorities on the law of evidence state those matters which may be judicially noticed, and international law is not amongst them.<sup>83</sup> It would appear that international law must be proved in court in the same way as foreign law, namely, by an expert in such law giving evidence to that effect.

But it is not only by criticising Lauterpacht's views that one can see the many different and varied arguments against the theory that international law is part of the common law. Several of these arguments relate to the idea that the 1708 Act granted the ambassador his privileges in English law for the first time.<sup>84</sup>

Lord Mansfield, as has been said, quoted Lord Talbot in *Barbuit's* case<sup>85</sup> as saying that the law of nations was part of the law of England. In fact, what Lord Talbot said was that "7 Anne cap. 12 . . . is only declaratory of the ancient universal *jus gentium*"; he did not go any further. His editor has added a note to the report of the case, which says that the law of nations in its fullest extent was, and formed part of, the law of England. In *Triquet v. Bath*<sup>86</sup> Lord Mansfield quotes Lord Talbot, not from the report of the earlier case, but from a note he had made as counsel in the case. One writer, at least, was of the opinion that Talbot's editor added the note to *Barbuit's* case after reading Mansfield's judgment in the later case.<sup>87</sup> Even if one does not go this far, it would appear very likely that Mansfield endorsing Talbot's view was in fact Mansfield interpreting Talbot according to his own view. The other judicial dicta, although numerous, do not in a single instance show further examination of the pre-1709 authorities. They were based on Lord Mansfield's judgments and the very pronounced and categorical views of juristic writers on international law. Each succeeding judgment was also based on the one before it, so that one is confronted with authority heaped on authority, without any basic facts and reasoning to show that this aspect of international law had in fact become incorporated into the common law. Indeed, if we look a little further, we shall find that there were authorities and facts which seem to prove the contrary. There were few cases<sup>88</sup> indeed where diplomatic privilege or immunity as such was granted to visiting envoys. They may not have been imprisoned, but many were

83. See PHIPSON, EVIDENCE 46-71 (10th Ed.); NOKES, INTRODUCTION TO EVIDENCE (3rd Ed.) 53-62.

84. See ADAIR, *op. cit. supra* note 11, at 239-243; 13 *Journal of Comparative Legislation & International Law* 133; 2 *Cambridge Historical Journal* 290-7.

85. Cas. temp. Tal. 281 (1736).

86. 3 Burr. 1478 (1764).

87. See ADAIR, THE EXTERRITORIALITY OF AMBASSADORS IN THE SIXTEENTH & SEVENTEENTH CENTURIES 239.

88. *Id.* at 14.

quietly recalled and in no case was the privilege successfully pleaded and upheld. Admittedly, the system of law reporting in the sixteenth and seventeenth centuries was not the model of clarity which we have come to expect of today's reports, but even allowing for the somewhat difficult explanations and phraseology, one cannot discover an instance of any such successful plea in a court of common law.

Adding further support, we notice that the men who were responsible for the assault on Matteuo<sup>89</sup> were never punished. The reason would appear to be that they were punishable by prerogative powers only and that after the Stuart heyday, the decline in the exercise of the prerogative made it difficult to punish them at all. They had offended neither statute nor common law principle, and *that* was the reason for the passing of the Act. That the Act was passed to ensure punishment in the future is further shown by Queen Anne's letter to the Czar,<sup>90</sup> in which she said that anyone violating an ambassador's privileges "will be liable to be the most severe penalties and punishments which the arbitrary power of the judges shall think fit to inflict upon them and to which no bounds are given in this new Act." Surely no statement could show the true position of the new Act more clearly than this. It cannot be denied that under principles of international law, immunity for ambassadors and their envoys did exist, but they were not enforceable in the courts before 1709, but rather by prerogative power. The procedure was that the affronted ambassador would appeal to the monarch who would refer the matter to the Privy Council; the offender would then generally be imprisoned at the sovereign's pleasure.

A certain passage from *Blackstone's Commentaries* would seem to endorse the view that the 1708 Act was an innovation:

[I]n consequence of this statute, *thus declaring and enforcing the law of nations*, these privileges are now to be held part of the law.<sup>91</sup>

Judicial authority in support of this argument is not lacking and one can find heavy authority for the more realistic view in *R. v. Keyn*.<sup>92</sup> Although it is not a case connected with diplomatic immunity, it bears direct relation to the problem of international law and common law. In this case, *The Franconia* ran into *The Strathclyde* and as a result of the collision, a passenger on the latter ship was killed. The German captain of *The Franconia* was charged with manslaughter and the question of jurisdiction arose, since the collision occurred within three miles of English shores. The applicable rule of international law was that any sea within that limit should be subject to the jurisdiction of the adjacent shore. A

89. See 10 Mod. Rep. 4 (1709).

90. STOWELL & MUNRO, INTERNATIONAL CASES, PEACE 4.

91. *Supra* note 47, at 256. (Emphasis added.)

92. [1876] 2 Ex. Div. 63.



minority of the judges in the Court for Crown Cases Reserved held that the court had jurisdiction, on the ground that international law was part of the law of England. However, the majority of judges agreed that only those parts of international law were part of English law *which can be proved to have been received into English law*. Such reception, said Cockburn, C.J., could be effected by statutory incorporation of international law, assent of the nations bound by the law, established usage or judicial decision.<sup>93</sup> He went on to observe that

in the absence of proof of assent as derived from one or other of these sources, no unanimity on the part of theoretical writers would warrant the judicial application of the law on the sole authority of their views and statements.

Following Cockburn, C.J.'s view, Lord Alverstone in *West Rand Cent. Gold Mining Co. v. R.*<sup>94</sup> observed that the international law sought to be applied must be proved by satisfactory evidence either to have been recognised and acted upon in England or to be of such a nature "that it can hardly be supposed that any civilised state would repudiate it." He added:

[T]he mere opinions of jurists, however eminent or learned, *that it ought to be so recognised* are not in themselves sufficient.<sup>95</sup>

In *Commercial and Estates Co. of Egypt v. Board of Trade*<sup>96</sup> Atkin, L.J., observed that "international law as such can confer no rights cognisable in the municipal courts. It is only in so far as the rules of international law are recognized as included in the rules of municipal law that they are allowed in the municipal courts to give rise to rights and obligations." A similar statement was made in *Chung Chi Cheung v. R.*<sup>97</sup> by the same judge, who observed that "so far, at any rate, as the courts of this country are concerned, international law has no validity save in so far as its principles are accepted and adopted by our own domestic law. There is no external power that imposes its rules on our own code of substantive law or procedure."<sup>98</sup> In *Compania Naviera Vascongado v. S.S. Cristina*,<sup>99</sup> which established the jurisdictional immunity of a foreign ship in regard to its property, Lord Wright said that a rule of international law was binding "on the municipal courts of this country in the sense, and to the extent that, it has been received and enforced by these courts."<sup>100</sup> Despite the weight of English judicial dicta in the above cases to the effect that international law is not part of the common law unless it is received or

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93. *Id.* at 202-3.

94. [1905] 2 K.B. 391.

95. Emphasis added.

96. [1925] 1 K.B. 271, 295.

97. [1939] A.C. 160.

98. *Id.* at 167, 168.

99. [1938] A.C. 485.

100. *Id.* at 502.

adopted into it, Lauterpacht concludes that English judges are bound by international law wherever the rules apply.<sup>101</sup>

It is suggested that the arguments in favour of accepting Lauterpacht's conclusion are less cogent than those against it. In the sphere of diplomatic immunity prior to 1709, there was no authority for accepting the proposition that the international principles had become incorporated into English law and as has been noticed, in no case was immunity successfully pleaded and upheld. It is understandable that international writers want to suggest that international law is part of the common law, but as regards this topic, their contentions cannot be accepted. It seems clear from this survey that the view of Lord Mansfield and those who followed him, that *vox judicis vox Dei non est*, and that the Statute of 1708, though widely thought to be declaratory of the common law, really introduced this principle of international law into the common law and for the first time provided penalties for its breach.<sup>102</sup>

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101. See similar arguments by Westlake 22 L.Q. REV. 14; Morgenstern, 27 BRIT. YB. INT'L L. 42; 1 SCHWARZENBERGER, INTERNATIONAL LAW ch. 3.

102. See 14 HOLDSWORTH, *op. cit. supra* note 67, at 31; DIAS, JURISPRUDENCE 154-55 (2d Ed.).